No. 48443-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MARGARET M. HOUSE,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent,

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The law and policy of the Industrial Insurance Act leads to the conclusion that the Department should include the unemployment compensation Ms. House was receiving at the time of her industrial injury in her wage order, in order to adhere to the underlying purpose and policy of the Act of reducing economic harm to injured workers. RCW 51.08.178 is ambiguous, and therefore it must be construed liberally in favor of Ms. House as the injured worker. The Superior Court's decision, affirming the Board, undercuts the purpose and policy of the Act by holding that Ms. House is not entitled to have this unemployment compensation included in her wage order, thereby, causing Ms. House to suffer an unnecessary and unjust economic loss.

When taking the statute, the code, and the case law as a whole, and reading it with the requisite liberal construction, Ms. House's unemployment benefits should be included in her wage order.

II. ARUGMENT

A. RCW 51.08.178 is Ambiguous, and Therefore the Doctrine of Liberal Construction Applies.

The Industrial Insurance Act was established to protect and provide benefits for injured workers. In order to ensure the purpose of the Act is

carried out, it has been well established that the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295 (1987). The Respondent's contentions that liberal construction does not apply here are inaccurate because RCW 51.08.178 is ambiguous, and therefore a plain language reading of the statute is inappropriate.

In its brief, the Respondent attempts to do away with the doctrine of liberal construction by asserting that "the plain language of RCW 51.08.178 includes only wages received from *an* employer in the calculation." Resp. Br. at 6 (emphasis added). However, this is a conclusion reached by the Respondent's own interpretation of two conflicting portions of the statute. The Respondent cites to the portion of the statute that states "wages the worker was receiving from *all* employment," and couples it with another portion of the statute which states "consideration... received from *the* employer," in order to infer a rule that wages must come from *an* employer in order to be considered in the wage order. Resp. Br. at 4, 6 (emphasis added). However, a plain language reading shows that the term "*an* employer" is decidedly absent from the statute. A plain language reading of

the statute cannot yield a rule that is premised around a key term such as "an employer" when that term is not included in the text of the statute itself.

Furthermore, the plain language of the portions of the statute the Respondent relies on to reach this conclusion contradict themselves. First, RCW 51.08.178(1) states that "the monthly wages the worker was receiving from *all employment* at the time of injury shall be the basis upon which compensation is computed..." (emphasis added). This same provision of RCW 51.08.178(1) goes on to say "the term 'wages' shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from *the employer* as part of the contract of hire..." (emphasis added). The plain language of the statute seems to indicate in one part that computation is based on wages from a single employer, whereas it earlier indicates that wages from all employment should be considered. This inherent inconsistency in and of itself creates an ambiguity, triggering the necessity to apply liberal construction.

Additionally, the Washington State Supreme Court has determined that the provision of RCW 51.08.178 discussing other consideration of like nature is subject to more than one reasonable interpretation, is ambiguous, and open to judicial interpretation. See *Cockle v Dep't of Labor & Indus.*, 142 Wash.2d 801 (2001). The Court has further noted that the term "wages"

itself is open to more than one interpretation, and therefore liberal construction should apply. *Id.*

The Respondent's argument that the plain language reading of the statute only includes wages received from an employer in the calculation is also flawed because it is inconsistent with the law in practice as well. For example, it is undisputed that if an injured worked receives tips, those are included in the wage rate calculation. WAC 296-14-522. However, tips do not come from an employer, they come from customers, and are not part of the contract for hire with the employer. Following the logic of the Respondent's plain language argument, tips would be excluded from the calculation as well, but they are not. As such, there is abundant ambiguity in the statute, and with that ambiguity, there must be liberal construction.

B. Ms. House's Unemployment Compensation is Consideration of Like Nature, and the Law Does Not Require a Limitation on How Income is Spent in Order to be Considered Critical to Protecting a Worker's Basic Health and Survival.

In determining what type of "other consideration of like nature" qualifies as a wage within the meaning of RCW 51.08.178(1), the Washington State Supreme Court defined the phrase "consideration of like nature" to include benefits that are readily identifiable and reasonable calculated in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and

survival. *Cockle*, at 822. There is no requirement in the statute or case law that a benefit must be designated for some specific, worthy purpose in order to establish that it is critical to protecting an injured worker's basic health and survival. To find Ms. House's unemployment benefits as not critical to protecting her basic health and survival because she can spend them how she chooses is illogical and unfounded.

In its brief, the Respondent argues that Ms. House is able to use her unemployment compensation benefits for any purpose, and is not limited to using them only to further her basic health and survival. Resp. Br. at 12. However, there is no indication in *Cockle* that such a limitation on how a benefit can be spent must exist in order to be critical to protecting an injured worker's health and survival. Any income, whether it is wages, bonuses, unemployment benefits, or any other government benefits, could be used for something not limited to basic health and survival. It is not only unemployment benefits that have the freedom to be used however one sees fit. What the Respondent calls wages, or any other income from the employer, also has the potential to be used for purposes not limited to basic health and survival. This makes them no less critical to protecting an injured worker's basic health and survival.

Furthermore, Ms. House's unemployment benefits were quite clearly critical to, and used for protecting her basic health and survival.

They were necessary for her to be able to maintain her basic health and survival, because the income from her time worked with the employer, part-time income, was not enough to sustain her. Ms. House was originally hired with the City of Roy in a full-time capacity. Then, after over a year of employment, budgetary constraints forced the city to reduce her position to part-time. In order to continue to work for the City, which she enjoyed, but also in order to continue to have money to survive, she was forced to file for and begin receiving unemployment benefits. These unemployment benefits were necessary for her basic health and survival.

Here, relevant case law shows that Ms. House's unemployment compensation constitutes consideration of like nature under RCW 51.08.178, because it is a readily identifiable and reasonably calculated in-kind component of Ms. House's lost earning capacity at the time of her industrial injury that is critical to protecting her basic health and survival. Any attempt to lessen the importance of these benefits because there was no restrictions on how they could be used is supported by neither law or fact.

C. Unemployment Compensation Should Be Treated as Dual Employment, and Failing to Do So Would Undermine the Purpose of the Act.

The Industrial Insurance Act is clearly designed to execute the purpose of reducing to a minimum the suffering and economic loss that arises from injuries on the course of employment. RCW 51.12.010. One

of the ways in which the Act has been interpreted to achieve this purpose is in its treatment of dual employment. As previously noted, the Board has determined that wages a worker is receiving from all employment, including from jobs other than the job-of-injury, must be factored into the time-loss calculation when that income is also lost as a result of the industrial injury. *In re Kay Shearer*, BIIA Dec. 96 3384 (1998). The Respondent takes the position that because Ms. House's unemployment compensation benefits did not come from an employer, her situation is not akin to dual employment. Resp. Br. at 15. However, this argument misunderstands the very nature of the statute, and of Ms. House's situation.

Ms. House does not argue that she was an employee of Employment Security, but that does not mean her receipt of unemployment compensation benefits at the time of her industrial injury are not "akin" to dual employment in these circumstances. To be akin is to be similar or related, not identical. The Respondent's argument again fails to take liberal construction into account here, and this narrow approach yields a result the undermines the Act. In Ms. House's case, her unemployment compensation is another form of income that was lost as a result of her industrial injury. Ms. House was originally hired to work full time, and she was only receiving unemployment compensation because

her hours were involuntarily reduced by the City of Roy. Ms. House's unemployment compensation filled the exact same role that a second job would have filled. And just like in the case of dual employment, Ms. House wan no longer able to receive her unemployment benefits once she was injured.

This is a unique situation, and looking at it as a whole, there are a number of factors at play here that are analogous to dual employment, and very few that differ. In this case, Employment Security stepped into the shoes of a second employer, to provide the same type of benefit that would be provided by a second employer. Ms. House lost her unemployment as a direct result of her industrial injury, and under the Respondent's interpretation of the statute, she would be left with no recourse to replace it. Clearly, such an result flies in the face of the Act, which is designed to protect people like Ms. House, and reduce their economic suffering caused by an industrial injury. The loss of her unemployment benefits is quite clearly economic suffering caused by her industrial injury. Therefore, Ms. House's unemployment would be akin to dual employment and should be included in the wage order.

III. CONCLUSION

Ms. House is entitled to have her unemployment compensation benefits included in her wage order. RCW 51.08.178 is ambiguous, and in

order to effectuate the purpose of the Act, it must be liberally construed with doubts resolved in favor of Ms. House, the injured worker. Taking the statute, code, and case law as a whole and reading it with the requisite liberal construction, Ms. House's unemployment compensation is in fact consideration of like nature and akin to dual employment, and therefore must be included in her wage order.

Dated this 14th day of September, 2016.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and ASSOCIATES

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CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 14th day of September, 20016, the document to which this certificate is attached, Appellant's Reply Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

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DATED this 14th day of September, 20016.

Lynn M. Venegas

LYNN M. VENEGAS, Secretary